

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6146

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

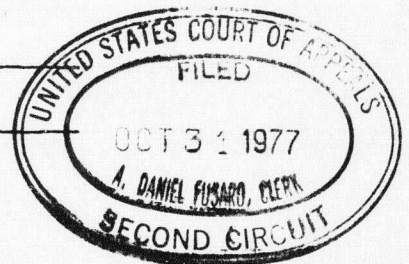
v.

190 PIECES OF GOLD JEWELRY,

Defendant-Appellant.

Docket No. 77-6146

APPENDIX



SALTEN RODENBERG
Attorney for
Defendant-Appellant
Office & P. O. Address
400 Walbridge Building
Buffalo, New York 14202
716-852-5818

PAGINATION AS IN ORIGINAL COPY

INDEX

	Page
Docket Entries	1
Libel	2
Answer	4
Decision	6
Judgment on Decision	17
Notice of Appeal	19

DATE	PROCEEDINGS	Case Order Judgment No.
1974		
Aug. 20	Filed libel.	
20	Issued Warrant of Seizure & monition ret. 9-16-74 & 5 copies.	
20	JS 5 made	
Sept. 9	Filed Mar. ret. on Libel served on Herman Klein on 8-29-74.	
12	Filed Defts. answer.	
16	The Ct. ordered case referred to the Magistrate.	
1975		
Feb. 5	Pretrial conference held before Magistrate	
Apr. 16	Filed Pltfs. pre-trial statement.	
Aug. 12	Filed Pltfs. Note of Issue for the Buffalo Nov., 1975 Term.	
12	" Pltfs. affidavit of service by mail of Note of Issue.	
Dec. 22	Status report. The Govt consents to a trial before the Magistrate Clerk to prepare order for trial and decision of this case before the Magistrate	
1976		
Jan. 5	Filed order referring the action to the Magistrate for trial and decision-Curtin, DJ Notice & copies to U.S. Atty. & Salten Rodenberg	F-172
Dec. 20	Case called to trial before Magistrate Maxwell without a jury.	
1977		
Feb. 22	Ct. directs attys. to submit briefs on the law by 3-14-77 & any responses by 3-18-77.	
Mar. 18	Filed Pltf's memorandum.	
May 20	Filed Deft's. pre-trial statement; Filed Deft's. memorandum.	
June 30	Filed Decision that the jewelry seized from the person and vehicle of Herman Klein on 1-6-72, are forfeited to the U.S. & that Herman Klein is liable to a penalty to the U.S. in the sum of \$21,038.00-Maxwell, U.S. Mag. Notice & copies to U.S. Atty. & Salten Rodenberg	F-189
30	Filed Judgment on Decision by the Ct.-Clerk NOTICE & copies to U.S. Atty. & Salten Rodenberg	F-189
30	JS 6 made	
Aug. 29	Filed Deft's. Notice of Appeal (cy. mailed to U.S. Atty., Attn. Roger Williams and to Clerk, CCA with copy of docket entries; CCA's Forms C and D Mailed to Mr. Rodenberg)	
Sept. 27	Original papers, docket entries and Clerk's certificate mailed to Clerk, CCA	

CLOSED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff

v.

190 PIECES OF GOLD JEWELRY,
Defendant

CIV. NO.

74-399
74-399

LIBEL

The United States of America, by its attorney,
John T. Elfvin, United States Attorney in and for the
Western District of New York, respectfully shows to the
Court:

1. That this Libel is filed by the United States
of America and prays condemnation of certain articles as
hereinafter set forth pursuant to Title 19, United States
Code, Section 1610.

2. That Herman Klein attempted to smuggle into ~~X~~
the United States, in violation of Title 19, United States
Code, Section (1497) and Title 18, United States Code,
Section (545), certain articles, the same being 190 pieces
of gold jewelry having a market value of approximately
\$21,038.00.

3. That the aforesaid articles were seized by the
United States Customs Agency on January 6, 1972 at the
Peace Bridge, Buffalo, New York, in the Western District
of New York.

4. That the aforesaid articles are held by the
Customs Agency Service, Buffalo, New York.

5. That by reason of the foregoing, the aforesaid
articles are subject to forfeiture pursuant to Title 19,
United States Code, Section 1497 and the said Herman Klein
liable to a penalty equal to the value of such articles

and such articles are liable to condemnation pursuant to the provisions of Title 19, United States Code, Section 1610.

WHEREFORE, plaintiff prays that process in due form of law according to the course of this Court issue; that all persons having any interest therein be cited to appear and answer the aforesaid premises; that this Court decree the condemnation of the aforesaid articles; that the aforesaid articles be disposed of as this Court may direct pursuant to the provisions of Title 19, United States Code, Section 1581, et seq.; and that the plaintiff have such other and further relief as to the Court may seem just and proper.

UNITED STATES OF AMERICA

By:

(s) John T. Elfvin

JOHN T. ELFVIN

United States Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

VS

Civ. No. 74-399

190 PIECES OF GOLD JEWELRY

Answer

HERMAN KLEIN, by counsel, SALTEN RODENBERG, for his
answer to the Libel filed to effectuate the forfeiture of 190
Pieces of Gold Jewelry to the Government:

1. Admits those allegations included in paragraphs
"1", "3" and "4" of the described Libel.
2. Denies each and every allegation included in para-
graphs "2" and "5" thereof.

FOR A SEPARATE AFFIRMATIVE DEFENSE AND
COUNTERCLAIM TO RECOVER THE 190 PIECES
OF GOLD JEWELRY, HERMAN KLEIN ALLEGES:

3. That the January 6, 1972, seizure by the United
States Customs Agency of the merchandise described in the Libel as
190 Pieces of Gold Jewelry was unlawful.
4. That HERMAN KLEIN is the owner thereof.
5. That the merchandise is being illegally withheld
from him by the United States Customs Agency stationed in Buffalo,
New York.
6. That the seized merchandise was purchased in the
United States by the Claimant Klein.
7. That no tax is due the Government thereon.

WHEREFORE, the claimant, HERMAN KLEIN, asks that the
Libel seeking the condemnation of the merchandise be dismissed and

and that the property be returned to him and that this Court afford the claimant such additional relief as to it appears proper in the circumstances.

SALTEN RODENBERG
Attorney for Claimant
Office & P. O. Address
400 Walbridge Building
Buffalo, New York 14202

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

CIVIL NO.

190 PIECES OF GOLD JEWELRY,

74-399

Defendant.

DECISION

EDMUND F. MAXWELL, UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

CIVIL NO.

190 PIECES OF GOLD JEWELRY,

74-399

Defendant.

Appearances: Hon. Richard J. Arcara
United States Attorney
By Roger P. Williams
Assistant United States Attorney
502 United States Courthouse
Buffalo, New York 14202

Salten Rodenberg
Attorney for Defendant and Claimant Herman Klein
400 Walbridge Building
43 Court Street
Buffalo, New York 14202

Pursuant to the stipulation of counsel and the order of the Hon. John T. Curtin, the above matter has been referred to the undersigned for trial and decision. Trial was held on December 20, 1976 and February 22, 1977. Legal memoranda were submitted by the plaintiff on March 18, 1977 and by the attorney for Herman Klein, on May 20, 1977. The following constitutes my Findings of Fact and Conclusions of Law.

On January 6, 1972, at approximately 10:30 p.m., the claimant, Herman Klein, approached the Peace Bridge at Buffalo, New York, from the Dominion of Canada, driving a 1968 Oldsmobile bearing Ontario registration No. 125229. When questioned as to his citizenship, Klein claimed to be a Canadian citizen with United States resident status. When asked if he was importing anything, he replied that he had purchased some fish in Canada. When asked if he was importing anything else, Klein stated that he was not.

Klein was then sent to secondary inspection for further questioning, in view of the fact that he was driving a vehicle registered in Canada. Klein presented a United States alien registration card, an Ontario drivers license, and an Ontario vehicle registration for his Oldsmobile. He advised the Customs inspector that he was going to New York where he lived. When asked what he was doing in Canada, Klein responded that he was in the cattle business and had been on a cattle buying trip to Toronto for approximately four days. He could not recall the names of any motels he claimed to have stayed in, nor could he produce any receipts for payment of motel rooms. He refused to give the names of any persons he visited on his cattle buying trip. When asked if he was bringing anything back with him from Canada, he responded in the negative. A search of Klein's pockets

revealed a watch, a gold ring, and a pair of earrings. When asked why he did not mention this jewelry, Klein responded that he did not think it mattered as the jewelry was from the United States. He was told by the Customs inspector that he should have mentioned the jewelry. The Customs inspector asked if he was sure that he was not in the jewelry business as opposed to the cattle business but Klein denied being in the jewelry business. Klein was then taken to his vehicle and asked what he had in his car. Klein stated that he had a box of fish, a suitcase, and some clothes, and when queried as to whether he was sure these were the only items in the car, Klein responded by saying "That is all I have." A subsequent inspection of the vehicle revealed that cases containing 187 pieces of gold jewelry had been concealed behind false cardboard panels in the trunk of the vehicle. One of the pieces, a watch, bore the imprint "Italy" on its clasp.

The claimant, Herman Klein, a native of Czechoslovakia, resided in Canada from 1952 until 1968 when he moved to the United States. While living in Canada, he had been in the retail meat business. He had not been in the jewelry business prior to 1968, but after he became a resident of the United States, he opened a

jewelry business in New York City under the name of Comfort Jewelers and in Toronto, Ontario under the name of Consolidated Gold Craft, Ltd. Within a few days prior to the seizure, a Toronto bank account for the Canadian firm was still open. The Canadian business had been engaged in the importation of jewelry from the United States and Klein had knowledge of Customs regulations. He paid a penalty to Canadian Customs in 1969 for undervaluing jewelry being imported into Canada.

As admitted by Klein in his trial testimony, he lied to the United States Customs authorities on January 6, 1972 when he claimed to have been in Canada for four days on a cattle buying trip, he lied when he denied being in the jewelry business, and he lied when he denied having anything in his automobile except a box of fish and personal clothing. His claim is that the jewelry found in the trunk was put in the car on January 4, 1972, in New York City, that it was in the car when he went into Canada,¹ and that the same jewelry was in the trunk of his vehicle when he returned to the

1 There was no evidence as to whether Klein declared the jewelry to Canadian Customs upon his entry into Canada from the United States. Klein did state that he did not make any type of export declaration to United States authorities upon leaving this country for Canada. (See 19 C.F.R. §10.17(a), now 19 C.F.R. §148.31.)

United States on January 6, 1972. He further claimed that all of the jewelry in the trunk had been manufactured in the United States. Thus, he contends that it is not subject to duty on reentry and therefore need not have been declared to Customs.

The Government has brought this libel action under Title 19 U.S.C., Section 1497, which provides as follows:

"Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article."

As promulgated by the Secretary of the Treasury, the regulation set forth in 19 C.F.R. Section 10.19(a) (19 C.F.R. §148.11)² provided as follows:

"Declaration and entry— (a)
Declaration required. All articles brought into the United States by any individual shall be declared to a customs officer. . . ."

2 All C.F.R. references are to the section numbers as of January 6, 1972. Present section numbers are set out in parenthesis.

Title 19 U.S.C., Section 1496, provides as follows:

"The collector may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefor has been made."

It is the position of the Government that the claimant was required to declare the merchandise upon entry into the United States, that no declaration was made by Klein prior to examination, and that the undeclared merchandise was thus subject to forfeiture.

Klein concedes that if the merchandise in question were of foreign origin it would be subject to forfeiture, as, by his own admission, he did not declare the jewels.

The Government contends that its burden of proof in the case is met if the merchandise is brought into the United States without the required declaration, and I believe that its position is correct.

U. S. vs. One Lot of Emeralds, 461 F2d 1180 (5th Cir 1970), affirmed 409 U.S. 232 (1972).

If the question of the initial origin of the goods is material to the issues herein, the burden of

proving domestic origin rests on the claimant, and he has not met that burden. The only evidence which might indicate domestic origin, other than Klein's testimony, consisted of various invoices introduced by claimant which purported to show that the jewelry found in the trunk had been purchased in the United States.³ While these invoices related to items of jewelry allegedly purchased by Klein, there was nothing in the invoices which specifically describes or refers to the jewelry in question. We had only the testimony of Mr. Klein to that effect and I do not credit his testimony.

If the jewelry had been manufactured in the United States, it is inconceivable to me that he would not have declared it at the border. If, as he claimed, it was not subject to duty, being a domestic item, there would be no logical reason for him to deny its presence in the vehicle. After the three items of jewelry were found in his pockets and prior to the search of the auto, he was asked why he did not declare them. He responded that he didn't think it was necessary because they were manufactured in the United States. Customs

3 There was no claim made on trial that the three items of jewelry found on his person were of domestic origin.

Inspector Adams told him that he should have mentioned them. Adams then asked what was in the car. At that time, if the jewelry in the car was actually of domestic origin and if Klein honestly believed that it was not subject to duty, he would have mentioned it after being specifically told by Adams that domestic origin jewelry should be declared. It should also be noted that at this time he did mention his personal clothing which would not be subject to duty. Thus, his explanation on trial as to the reason for not declaring it is not persuasive.

Even if it were found that the jewelry were of domestic origin, it is subject to forfeiture because of Klein's failure to make a declaration. The Customs regulations specifically provide that "All articles brought into the United States by any individual shall be declared to a customs officer" 19 C.F.R., Section 10.19(a) (19 C.F.R. §148.11). No exception is made for domestic items.

The regulations set out the procedure to be followed for reentry of domestic items without duty. 19 C.F.R., Section 10.17(a) (19 C.F.R. §148.31). The claimant, a citizen of Canada and a resident of the United States who conducted jewelry operations in Canada and the United States and who had in the past delivered

jewelry from this country to Canada, should have been aware of these provisions. In any event, the articles, whether of foreign or domestic origin, should have been declared, and the courts have so held since the early years of this country. To hold otherwise would completely frustrate the purposes of the revenue laws. The Active, 1 Fed. Cas. No. 33, (D.C.Oreg. 1866); In re Ten Cases of Opium, 23 Fed. Cas. No. 13,828, (D.C.Oreg. 1864); U. S. vs. 20 Cases Matches, 28 Fed. Cas. No. 16,559, (D.C.Wis. 1868).

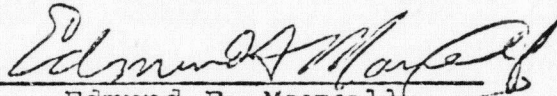
During the course of the trial, the attorneys for the Government and for Claimant, Klein, stipulated that if an expert appraiser were to testify, the seized jewelry would be valued at \$21,038.00. There being no other evidence to the contrary, I find that the value of the jewelry is \$21,038.00.

The Warrant of Seizure and Monition and the Libel in this proceeding were personally served on the claimant Herman Klein and he has personally appeared herein by the filing of an Answer.

For the reasons stated above, I find that the jewelry seized from the person and vehicle of Herman Klein on January 6, 1972, are forfeited to the United States

and that Herman Klein is liable to a penalty to the
United States in the sum of \$21,038.00.

So Ordered.

A handwritten signature in cursive script, appearing to read "Edmund F. Maxwell", written over a horizontal line.

Edmund F. Maxwell
United States Magistrate

Dated: Buffalo, New York

June 30, 1977

UNITED STATES OF AMERICA

-vs-

Civ- 74-399

190 PIECES OF GOLD JEWELRY

JUDGMENT

SIR: Take notice of an ~~ORDER~~, of which the within is a copy duly granted in the within entitled action on the 30th day of June, 1977, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 30th day of June, 1977.

Dated: Buffalo, New York

June 30, 1977

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

TO: Richard J. Arcara, Esq.
Attorney for Plaintiff

TO: Salten Rodenberg, Esq.
Attorney for Defendant

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Civil Action File No. 74-399

vs.

JUDGMENT

190 PIECES OF GOLD JEWELRY

This action came on for trial before the Court, Honorable Edmund F. Maxwell, United States District Magistrate, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the jewelry seized from the person and vehicle of Herman Klein on January 6, 1972, are forfeited to the United States and that Herman Klein is liable to a penalty to the United States in the sum of \$21,038.00.

Dated at Buffalo, New York, this 30th day of June, 1977.

JOHN K. ADAMS
Clerk of Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

vs

NOTICE OF APPEAL

190 PIECES OF GOLD JEWELRY
(HERMAN KLEIN)

Civ. No. 74-399

Defendant

NOTICE IS HEREBY GIVEN that 190 Pieces of Gold Jewelry (Herman Klein), the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from a final judgment granted and entered in the Office of the Clerk for the United States District Court for the Western District of New York, on June 30, 1977, and from each and every part thereof.

DATED: Buffalo, New York
August 29, 1977

YOURS, ETC.,

SALTEN RODENBERG
Attorney for Defendant
Office & P. O. Address
400 Walbridge Building
Buffalo, New York 14202
852-5818